EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 02278c

SE NBR 85-1-05972 CSY CASE STATUS: DECIDED
URT TITLE Schiro, Thomas N. DOCKETED: Dec 4 1985
VERSUS Indiana
*** CAPITAL CASE -- Stay granted by lower court ***

ıry	Date	Note	Proceedings and Orders
1	Dec 4 1985	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 2 1986		Brief of respondent Indiana in opposition filed.
4	Jan 9 1986		DISTRIBUTED. January 24. 198c
7	Feb 7 1986		REDISTRIBUTED. February 21.1986.
9	Feb 24 1986		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

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85-5972

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS N. SCHIRO,

Petitioner,

- vs. -

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

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ATTORNEY FOR PETITIONER

23pp

QUESTION PRESENTED

Whether imposition of the death penalty violates the constitutional requirement of reliability in capital sentencing under the Eighth Amendment of the Constitution of the United States, where a trial judge overrides a jury recommendation against the death penalty and relies upon personal observations of the defendant made by the judge outside of the courtroom proceedings?

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STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana filed on June 28, 1985.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Indiana, Cause No. 1084 S 423, is reported at 479 N.E.2d 556 (Ind. 1985) and is annexed as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Indiana was filed on June 28, 1985, and rehearing was denied on September 4, 1985. See Appendix B. Jurisdiction of this Court in invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. This action is brought

within the time limitations set forth in Supreme Court Rule 20.2, and 28 U.S.C. §2101(c), as the decision of the Supreme Court of Indiana affirming the denial of the petition for post-conviction relief in this case is a judgment in a civil action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States:

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The case also involves Indiana Code 35-50-2-9, which is annexed as Appendix C.

STATEMENT OF THE CASE

On September 12, 1981, following a trial by jury, Thomas Schiro was convicted of murder in Brown County, Indiana. Because the State had alleged the existance of an aggravating circumstance pursuant to the death penalty statute, Ind. Code 35-50-2-9, on September 15, 1981 the jury reconvened for the penalty phase of trial and returned a unanimous verdict recommending that the death penalty not be imposed upon Schiro. Thereafter, the trial judge conducted a sentencing hearing on October 2, 1981. The judge did not follow the jury's recommendation, and included the following statement in his written order imposing the death penalty:

> This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

Before issuing a written opinion on the direct appeal of the conviction and sentence, the Supreme Court of Indiana ordered the trial judge to make a nunc pro tunc entry to set forth new reasons for imposing the death penalty because "[t]he original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty." Schiro v. State, 451 N.E.2d 1047, 1056 (Ind. 1983), cert. denied, __ U.S.___, 103 S.Ct. 510, 78 L.Ed.2d 699. On February 22, 1983, the trial court certified to the Supreme Court of Indiana a new "Pronouncement of Sentence," which included verbatim the passage quoted above from the original sentencing order. On August 5, 1983, the Supreme Court of Indiana affirmed the conviction and death sentence, and on November 28, 1983 the Supreme Court of the United States denied a petition for writ of certiorari. Id.

On May 10, 1984, Schiro filed an amended petition for post-conviction relief alleging that the death sentence violated the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States because the trial judge improperly considered Schiro's conduct based upon the judge's view of Schiro outside of the court in the judge's outer chambers, and because of evidence that the judge was biased in favor of imposing the death penalty regardless of the jury's recommendation [TR.96]. An evidentiary hearing was held on the post-conviction relief petition, and testimony was offered concerning a statement made by the trial judge just prior to the verdict in the guilt phase of trial which presupposed that the death penalty would be imposed if Schiro were found guilty of murder. Following the denial of the petition for post-conviction relief in the trial court before a new judge, Schiro raised his same constitutional claims on appeal in the context of "whether the post-conviction court erred in finding the death penalty was proper in light of [the] allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination." Schiro v. State, 479 N.E.2d 556, 558 (Ind.

1985). In affirming the judgment denying post-conviction relief, the Supreme Court of Indiana addressed Schiro's claims on the merits and concluded that "[t]he post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge." Id., 479 N.E.2d, at 561.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, AFTER SPAZIANO V. FLORIDA, A STATE MAY ALLOW ITS JUDGES UNGUIDED DISCRETION TO OVERRIDE A UNANIMOUS JURY RECOMMENDATION AGAINST IMPOSITION OF THE DEATH PENALTY WITHOUT OFFENDING THE CONSTITUTIONAL REQUIREMENT OF RELIABILITY IN CAPITAL SENTENCING PROCEDURES.

This Court has long recognized that "[b]ecause of the qualitative difference [of the death penalty], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280,305,96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Thus, "many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231. In Spaziano v. Florida, 468 U.S. ___, 103 S.Ct. 3154, 82 L.Ed.2d 340 (1984), this Court wrote that "[w]e reaffirm our commitment to the demands of reliability in decisions involving death," at ___,104 S.Ct., at 3160, while also establishing that "there is no constitutional requirement that the jury's recommendation of life be final." Id., at ___, 104 S.Ct., at 3157. The question raised by the present case is whether, in accordance with the Eighth Amendment requirement of reliability in capital sentencing, a state may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty.

In the present case the judge overturned a unanimous jury recommendation against the death penalty and cited his impressions that the jury had been misled by Schiro's rocking motions in court which stopped when the jury was absent from the courtroom. But the observations which lead the judge to conclude that the jurors had been misled in their recommendations were based upon the judge's view of Schiro outside of the court in the judge's outer chambers. The observations were made over an eight day period of time when counsel may or may not have been present and with no formal procedural safeguards to assure reliability and validity in the observations. In particular, because the fact that the observations made by the judge became known only after the completion of sentencing proceedings when the judgment of sentencing was pronounced, there was no meaningful opportunity to challenge the observations cited by the judge as evidence that the jury may have been misled by Schiro's rocking motion which had accompanied lengthy and contested evidence regarding the question of his sanity. Unlike information contained in a presentence report which a defendant has an opportunity to explain or deny, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, or unlike demeanor evidence gathered "in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," Turner v. Louisiana, 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13, L.Ed.2d 424, the observations cited by the trial judge permitted him to exercise free-wheeling discretion in overriding the unanimous recommendation of the jury.

This Court's decision in Spaziano v. Florida does not settle the important issue of whether a state may give its judges unguided discretion to override a jury recommendation against the death penalty. In that decision, the Court found that the Florida standards for overriding a jury's recommendation were not "so board and vague as to violate the constitutional

requirement of reliability in capital sentencing." Id., at ___, 104 S.Ct., at 3157. In particular, the Court cited the "significant safeguard" established by the standards in Tedder v. State, 322 SO.2d 908 (1975), which the Court had recognized in the past as an important component of the Florida capital sentencing procedures. See Proffitt v. Florida, 428 U.S. 242, 249-250, 96 S.Ct. 2960, 2965-2966, 49 L.Ed.2d 913 (1976); Dobbert v. Florida, 432 U.S. 282, 295, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 344 (1977); Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3427, 77 L.Ed.2d 1134 (1983). Under the Florida standard, the override of a jury recommendation against the death penalty is permitted only where the evidence favoring death is "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra, 322 So.2d, at 910. In Spaziano v. Florida, the Court rejected the claim that the judge's override in that case violated the constitutional requirement of reliability because "[w]e are satisfied that the Florida Supreme Court takes [the Tedder] standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." Id., at ___, 104 S.Ct., at 3166.

The decision of the Supreme Court of Indiana in the present case makes it clear that in Indiana trial judges are accorded unguided discretion to override a jury recommendation against imposition of the death penalty. Insofar as the Supreme Court of Indiana has articulated any rules for the meaningful appellate review of death sentences, the court has adopted a rule applicable to any type of sentence whereby the court will only disturb sentences that are "manifestly unreasonable," which means that "no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed." Judy v. State, 416 N.E.2d 95, 107 (Ind. 1981); Brewer v. State, 417 N.E.2d 889, 899 (Ind. 1981); Williams v. State, 430 N.E.2d 759, 765 (Ind. 1982). The "manifestly unreasonable" standard does not yield under the circumstance where a judge overrides a jury recommendation

against the death penalty. See Schiro v. State, 451 N.E.2d 1047, 1052 (Ind. 1983). The "manifestly unreasonable" standard sets up a presumption in favor a judge's decision to override a jury recommendation, which is in sharp contrast to the "significant safeguard" established by the Tedder standard that gives careful scrutiny to the override decision. The decision in the present case demonstrates that the discretion accorded a trial judge in overriding a jury recommendation in Indiana runs so far afield as to permit reliance upon out of court personal observations of a defendant by the judge which counsel have no opportunity to explain or contest. This unguided discretion is contrary to the procedures required in Florida under the Tedder standard. To the extent that the existence of the Tedder standard was essential to satisfy the Court that there was no violation of the constitutional requirement of reliability in the Spaziano case, those principles cannot be reconciled with the manner in which the trial judge arrived at his decision to reject the jury's recommendation against the death penalty in Schiro's case. This Court, therefore, should grant certiorari to determine whether, after Spaziano v. Florida, a state may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty without offending the constitutional requirement of reliability in capital sentencing procedures.

CONCLUSION

Based upon the foregoing reasons, Petitioner Thomas N. Schiro requests this Court to grant certiorari to review the Supreme Court of Indiana decision on the important federal constitutional question presented here.

Respectfully submitted,

By: Paul Levy
Paul Levy
Deputy Public Defender
Attorney for Record

counsel was inadequate because he did not submit such an instruction.

In deciding whether to give a lesser included offense instruction, the trial court applies the following test:

"In determining whether to instruct the jury that they may return verdicts on lesser-included offenses, the trial court must apply a two-part test. First, by examining the statutes defining greater and lesser-included offenses, and the charging instrument, the court determines whether the lesser-included offenses to be instructed are inherently included in the greater charge, or 'factually' included in the charging instrument's allegations of the means by which the greater crime allegedly was committed. Second, the court must make a determination of whether, assuming that an offense was committed, the evidence would, *prima facie*, warrant a conviction for a lesser-included offense, or could only warrant a conviction for the principal charge, in which case the lesser-included offense instructions should not be given." (citations omitted.)

Henning v. State (1985), Ind., 477 N.E.2d 547, 550-551. In this case the evidence conclusively demonstrated that Officer Bauner obtained phencyclidine from someone. The issue at trial was whether or not he obtained phencyclidine from the Defendant. Thus, there is no question that a transaction involving phencyclidine did occur. An instruction that the jury could convict Defendant of the lesser offense of "possession," thus, would not have been warranted under the evidence, would have invited a compromise verdict, and would properly have been refused. Defendant has demonstrated no error by counsel in failing to submit such instructions.

[9, 10] Finally, Defendant presents a general attack upon trial counsel's performance, arguing in particular that he should have called character witnesses or presented other evidence on Defendant's behalf. However, before a claim of ineffective assistance of counsel can be premised upon his failure to present evidence, it must be shown that such evidence existed and was reasonably available. Defendant's claim of ineffective assistance of counsel is not borne out by the inaction cited.

We find no error, hence the judgment of the trial court is affirmed.

GIVAN, C.J., and DeBRULER and PIVARNIK, JJ., concur.

HUNTER, J., not participating.

Thomas N. SCHIRO, Appellant,
v.
STATE of Indiana, Appellee.
No. 1084S423.
Supreme Court of Indiana.
June 28, 1985.
Rehearing Denied Sept. 4, 1985.

Defendant, petitioned for postconviction relief. The Circuit Court, Brown County, James M. Dixon, J., denied the petition. Defendant appealed. The Supreme Court, Givan, C.J., held that: (1) trial judge's finding that defendant might have misled jury by his continual rocking motions during trial did not constitute basis for imposition of death penalty; (2) defendant had opportunity to challenge trial judge's observations regarding his conduct so that defendant's due process rights were not violated; (3) the trial judge's observations regarding defendant's conduct were not directed toward defendant's exercising of his constitutional rights; (4) defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain; (5) judge's remark regarding whether defendant was going to live or die was

APPENDIX A
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insufficient evidence from which to conclude that judge was so biased as to make sentencing determination arbitrary or capricious; and (6) instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms.

Affirmed.

DeBruler, J., dissented and filed an opinion.

1. **Criminal Law ⇐1158(1)**

In reviewing denial of posteonviction petition, Supreme Court does not weigh evidence or judge credibility of witnesses.

2. **Criminal Law ⇐1158(1)**

On review of denial of postconviction petition, petitioner must satisfy Supreme Court that evidence as whole leads unmistakably to decision in his favor.

3. **Criminal Law ⇐1208.1(4)**

Although trial judge's observations of defendant's behavior during course of trial were germane to his consideration of jury's recommendation that death penalty not be imposed, trial judge's finding that defendant might have misled jury by his continual rocking motions during trial when jury was present, but which did not occur when defendant was out of jury's presence, did not constitute basis for imposition of death penalty.

4. **Criminal Law ⇐1208.1(4)**

Trial court, within its discretion, can consider defendant's behavior in courtroom, regardless of whether jury is present and thus, judge in capital case is not precluded from considering defendant's behavior during course of trial even if evidence of such behavior is not admitted into evidence.

5. **Criminal Law ⇐986.2(6), 986.4(1)**

Trial court can properly consider such "non-evidentiary" information as presentence investigation report and its perception of defendant's remorse or lack thereof.

6. **Constitutional Law ⇐270(2)**

Defendant's due process rights were not violated under theory that death sentence was imposed on basis of information which defendant had no opportunity to deny or explain where, at sentencing hearing, judge expressly stated his observations of defendant's behavior and its relevance to sentencing determination, and thus defendant had opportunity to challenge observations and judge's conclusions based thereon, and where testimony was introduced to trial by both sides in reference to defendant's prior rocking behavior so that defense counsel could have presented additional evidence at sentencing hearing pertaining to statutory mitigating circumstances. IC 35-50-2-9(d)(1982 Ed.); U.S.C.A. Const. Amends. 5, 14.

7. **Criminal Law ⇐393(1)**

Trial judge's observations about defendant's rocking motions during trial were directed toward possible mitigating factors and jury's recommendation that death penalty not be imposed, not to defendant's exercising of his constitutional rights, and thus, trial court's consideration of defendant's behavior did not violate his right against self-incrimination. IC 35-50-2-9(d) (1982 Ed.); Const. Art. 1, § 14; U.S.C.A. Const.Amend. 5.

8. **Criminal Law ⇐641.13(7)**

Defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain where, at sentencing hearing, trial judge specifically stated his observations of defendant's behavior and jury's presence and relevance of those observations to sentencing determination so that counsel had opportunity to contemporaneously object to or rebut judge's observations. U.S.C.A. Const.Amend. 6.

9. **Criminal Law ⇐655(1)**

Judge's remark regarding whether defendant was going to live or die, made in emotionally charged atmosphere preceding return of verdict, was insufficient evidence from which to conclude that judge was so biased as to make sentencing determination arbitrary or capricious.

10. **Criminal Law ⇐1144.10**

In addressing issue of competency of counsel, Supreme Court indulges strong presumption that counsel's conduct falls within wide range of reasonable professional assistance.

11. **Criminal Law ⇐641.13(1)**

Under "performance component" of test employed in addressing issue of competency of counsel, defendant must show that counsel's alleged acts or omissions fell outside of wide range of reasonable professional assistance; if defendant satisfies that step, he must then establish under "prejudice component" that counsel's errors had adverse effect upon judgment.

12. **Criminal Law ⇐641.13(1)**

In applying two-step test employed in addressing issue of competency of counsel, it is not necessary to address both components if defendant makes insufficient showing as to one.

13. **Criminal Law ⇐641.13(2)**

Instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms for "guilty of murder while committing and attempting to commit rape but mentally ill" and "guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill," and thus, defendant was unable to establish that his trial counsel's failure to assure that jury received all necessary verdict forms had adverse effect on judgment. U.S.C.A. Const.Amend. 6.

Susan K. Carpenter, Public Defender, Frances Watson Hardy, Deputy Public Defender, Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Chief Justice.

Appellant was convicted by a jury of Murder While Committing or Attempting to Commit Rape. The trial court sentenced appellant to death. The conviction and death sentence were affirmed by this Court on direct appeal. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047 (DeBruler, J., and Prentice, J., dissenting as to sentence), *cert. denied*, — U.S. —, 104 S.Ct. 510, 78 L.Ed.2d 699. Appellant's Petition for Post-Conviction Relief was denied. He now appeals.

The facts of this case were set out at length in the opinion on direct appeal. *Schiro, supra* at 1049-50. They will not be repeated here.

Appellant raises two issues in this appeal: whether the post-conviction court erred in finding the death penalty was proper in light of his allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination; and whether the post-conviction court erred in finding appellant was not denied effective assistance of counsel.

[1, 2] In reviewing the denial of a post-conviction petition, this Court does not weigh evidence nor judge the credibility of witnesses. *Owens v. State* (1984), Ind., 464 N.E.2d 1277. The petitioner must satisfy this Court that the evidence as a whole leads unmistakably to a decision in his favor. *Bean v. State* (1984), Ind., 467 N.E.2d 671.

Appellant's first issue is divided into four subissues. In the first three subissues, which address the trial court's consideration of his behavior during the trial, appellant alleges: 1) that the information could not be relied upon because it was not introduced into evidence; 2) that because he did not testify, reliance on observations of his behavior violated his Fifth Amendment rights; and 3) that he was denied his right to effective assistance of counsel because defense counsel was not afforded an opportunity to comment on facts influencing the sentencing decision. The fourth subissue

concerns a comment made by the trial judge which appellant argues demonstrates the judge was biased and therefore unable to objectively render the sentencing determination.

Upon review of appellant's direct appeal, this Court found the trial court's original findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro, supra* at 1056. We ordered the court to make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind. Code § 35-50-2-9. *Id.* In its *nunc pro tunc* entry the court found that the aggravating circumstance set out in Ind.Code § 35-50-2-9(b)(1) was proved beyond a reasonable doubt.

The court then stated that it found no mitigating circumstances, and addressed each of the possible mitigating circumstances delineated in Ind.Code § 35-50-2-9. In reference to the statutory mitigating circumstances concerning a defendant's mental or emotional condition, subsection (c)(2), and impairment of a defendant's capacity to appreciate the criminality of his conduct, subsection (c)(6), the court made the following finding:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

Appellant contends this finding constitutes the court's primary basis for sentencing him to death after the jury had recommended the death penalty not be imposed. He argues that "obviously" the court based its death penalty judgment on its observations, representing an "absolute denial of due process."

[3] We cannot agree with appellant's conclusory assertion that the court based its judgment on observations of his behavior. The court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt. *Schiro, supra* at 1058. It addressed each of the possible mitigating circumstances delineated in the statute. Regarding appellant's mental state, the court made additional findings which cited testimony by psychiatric experts and evidence of appellant's attempt to conceal his crime. *Id.* at 1059. While the court's observations were certainly germane to its consideration of the jury's recommendation, it cannot be said its finding that appellant may have misled the jury constituted the basis for imposition of the death penalty.

[4, 5] Neither can we agree with appellant's contention that consideration of his behavior was impermissible because it was information not admitted into evidence. It is axiomatic that a trial court, within its discretion, can consider a defendant's behavior in the courtroom, regardless of whether the jury is present. The court can properly consider such "non-evidentiary" information as the pre-sentence investigation report and its perception of a defendant's remorse or lack thereof. We find no authority to support the conclusion appellant would have us draw, that a judge in a capital case is precluded from considering a defendant's behavior during the course of the trial if evidence of such behavior is not admitted into evidence.

Appellant nevertheless argues that under *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, the death penalty is invalid. In that case a Florida jury recommended a life sentence. The trial judge, as in the instant case, overrode the jury's recommendation and sentenced the defendant to death. In imposing the death penalty the judge stated that his decision was based in part on a presentence report which contained a confidential portion not available to the defense.

Id. at 353, 97 S.Ct. at 1202, 51 L.Ed.2d at 398-99.

The United States Supreme Court vacated the death sentence. The Court concluded the petitioner was denied due process because the death sentence was imposed, at least in part, on the basis of information which the petitioner had no opportunity to deny or explain. *Id.* at 362, 97 S.Ct. at 1207, 51 L.Ed.2d at 404. The Court found that because the confidential portion of the report was not part of the record on appeal, the Florida Supreme Court was unable to consider "the total record" in its review. *Id.* at 361, 97 S.Ct. at 1206, 51 L.Ed.2d at 404.

[6] The instant case is distinguishable. At the sentencing hearing the judge expressly stated his observations of appellant's behavior and its relevance to the sentencing determination. Appellant thus had an opportunity to challenge the observations, and the judge's conclusion based thereon, either contemporaneously or upon filing his motion to correct error. Further, this Court explicitly considered the controverted finding on review of appellant's direct appeal. *Schiro, supra* at 1057, 1059.

We also note that testimony was introduced at trial by both sides in reference to appellant's prior rocking behavior. Appellant introduced testimony that he rocked in the presence of witnesses. Despite appellant's contention of lack of notice of the court's conclusion based on such behavior, defense counsel, who was certainly aware of the continual rocking motions referred to by the court, could have presented additional evidence at the sentencing hearing pertaining to the statutory mitigating circumstances. *See* Ind.Code § 35-50-2-9(d). The due process violation found in *Gardner, supra* is not present here.

Appellant contends that because under the Fifth Amendment of the United States Constitution and Art. 1, § 14 of the Indiana Constitution the general trial demeanor and manner of a defendant who does not take the stand cannot be considered against him and no inference can be drawn from his failure to testify, the trial court's consideration of his behavior violates his right against self-incrimination.

[7] This argument is without merit. The sole case cited by appellant, *People v. Ramirez* (1983), 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31, is inapposite to the circumstances of the instant case. In *Ramirez* the State's attorney commented to the sentencing jury that the defendant had "sat silent" and offered no explanation for the crime. The Supreme Court of Illinois' decision to vacate the death sentence was based on the prosecutor's comment and the trial judge's refusal to properly instruct the jury not to consider the defendant's decision not to testify at the sentencing hearing. *Id.* at 472-73, 457 N.E.2d at 47.

Although the impermissible comment in *Ramirez* was couched in terms of the defendant's "conduct", the crux of the constitutional violation was the impropriety of commenting on the defendant's decision not to testify. Here, the trial judge's observations were directed to two of the possible mitigating factors and to the jury's recommendation, not to appellant's exercising of his constitutional rights. The record does not reveal any comment by the prosecution or by the court made in reference to appellant's decision not to testify at the sentencing hearing.

In an argument related to his contention that the trial court erred in considering non-evidentiary information, appellant asserts he was denied his Sixth Amendment right to effective representation upon the sentence being based on information which he had no opportunity to deny or explain.

[8] This argument is also without merit. At the sentencing hearing the trial judge specifically stated his observations and their relevance to the sentencing determination. Counsel thus had the opportunity to contemporaneously object to or rebut the judge's observations. As the finding was stated explicitly and openly, we cannot conclude that the court's reference to its observations of appellant's demeanor precluded defense counsel from commenting on facts influencing the sentencing deci-

sion. *See Gardner, supra*, 430 U.S. at 360, 97 S.Ct. at 1206, 51 L.Ed.2d at 403.

In his fourth subissue appellant alleges the trial judge was biased. This allegation is premised on a comment made by the judge to a newspaper reporter which appellant argues supports the conclusion the judge had predetermined that the death penalty would be imposed.

The newspaper reporter, Jocelyn Winnecke of the *Evansville Sunday Courier and Press*, testified at the post-conviction hearing that the judge, The Honorable Samuel R. Rosen, remarked to her after the guilty verdict was returned that "we're going to fry the boy." Judge Rosen testified that before entering the courtroom to receive the guilty verdict he said "soon we'll know whether he'll live or die." Judge Rosen also testified that he would never use the word "fry" in that context and that he did not make up his mind until the date of sentencing whether the death penalty would be imposed. Vanderburgh County Deputy Prosecutor Jerry Atkinson, who prosecuted the case, was privy to the conversation between Winnecke and Judge Rosen. His recollection at the hearing was that Judge Rosen stated "I think the boy is going to die."

[9] Appellant argues that the judge's statement, coupled with the judge's reliance on his personal observations, conclusively reflects bias and a predetermination of the death sentence. As stated *infra*, the observations were properly relied upon by the judge and in no way represent a loss of objectivity. The comment made by Judge Rosen, in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious. The post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge.

Appellant also alleges he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to assure that the jury received all the necessary verdict forms.

[10, 11] In addressing the issue of competency of counsel, this Court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Bailey v. State* (1985), Ind., 472 N.E.2d 1260; *Elliott v. State* (1984), Ind., 465 N.E.2d 707. We apply a two-step test comprised of a "performance component" and a "prejudice component". Under the first step, a defendant must show counsel's alleged acts or omissions fell outside the wide range of reasonable professional assistance. If the defendant satisfies the first step of the test, he must then establish that counsel's errors had an adverse effect upon the judgment. *Richardson v. State* (1985), Ind., 476 N.E.2d 497; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

Trial counsel did not submit verdict forms for the offenses of guilty of murder while committing and attempting to commit rape but mentally ill and guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill. *Schiro, supra* at 1062. Appellant contends that because the jury returned a felony murder guilty verdict on a count for which they were not supplied with a guilty but mentally ill verdict form confidence in the outcome of his trial was undermined.

This issue was raised in appellant's direct appeal in the context of trial court error in failing to supply the jury with all the necessary verdict forms. *Id.* We determined that appellant's Instruction No. 2, which informed the jury that the possible verdict of guilty but mentally ill was submitted to them on all counts of the information, sufficiently informed the jury that the mentally ill verdict "applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder." *Id.* at 1063. As appellant failed to show any prejudice, there was no reversible error on that issue. *Id.*

[12, 13] In applying the aforementioned two-step test, it is not necessary to address both components if the defendant makes an insufficient showing as to one. *Richardson, supra* at 501 (citation omitted). Because the instruction regarding the encompassing applicability of the guilty but mentally ill verdicts cured the potentially prejudicial impact of the omission of the verdict forms, appellant is unable to establish that counsel's omission had an adverse effect upon the judgment. The post-conviction court did not err in finding that appellant was not denied effective assistance of counsel.

The trial court is in all things affirmed.

PRENTICE and PIVARNIK, JJ., concur.

DeBRULER, J., dissents with separate opinion.

HUNTER, J., not participating.

DeBRULER, Justice, dissenting.

Petitioner-appellant was convicted of murder and sentenced to death. When the trial judge imposed the death sentence on October 2, 1981, he stated that he was relying in part on his personal observations of appellant's conduct in the Court's outer chambers, during the trial on the question of guilt or innocence, when the jury was not present. The trial judge had not previously disclosed to counsel for the parties that he had made those observations and that he would rely upon them in making the life or death decision. Thus, the decision itself was arrived at before counsel knew of this unique basis and had all opportunity to respond to it. This procedure does not satisfy the constitutional requirement of the due process of law.

In the aforementioned statement the judge said:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

This is the justification of the judge's rejection of the jury's recommendation of life. By this revelation, the judge discloses that he deemed himself by reason of his observations, to be in a better position than the jury to make the life-death decision. I believe this was error.

In *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 the sentencing judge indicated that he selected death in part because of information contained in a presentence report, which information had not been disclosed to the defendant or his counsel and to which the defendant had no opportunity to respond. The U.S. Supreme Court set the sentence aside. Here, the opportunity to respond to Judge Rosen's statement did not arise until after he had made and formally announced his decision to override the jury recommendation of life and impose death.

The standards of due process are flexible and dictated by the circumstances and competing interests involved. A hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. The interests of the defendant and the state in an accurate ascertainment of facts upon which a sentence of death may be given, are at the highest level. We are bound to adopt and adhere to procedures which insure against the arbitrary deprivation of life.

In these circumstances, the opportunity to respond to the factual information supplied by the judge's private observations, came after that factual information was used and the life or death decision was reached. This opportunity was not meaningful in time. The opportunity to respond

was restricted to a request to reconsider a decision which had already been reached and publicly announced. Much judicial time and energy had already been invested in arriving at that decision. One need only compare the process of reaching a decision with the process of retreating from a decision, to appreciate the reality of the restriction resulting from the procedure employed here. In sum, to permit the personal observations of the judge, this new matter, to be swept in at the last moment, without prior notice, and to be used as a critical part of the basis for the sentencing court's decision, is contrary to my sense of fairness.

Jerry Lee STOUT, Appellant
(Defendant Below),

v.

STATE of Indiana, Appellee
(Plaintiff Below).

No. 783 S 239.

Supreme Court of Indiana.

July 1, 1985.

Defendant was convicted in the Circuit Court, Jennings County, Larry J. Greathouse, J., of burglary and theft, and he appealed. The Supreme Court, Prentice, J., held that: (1) error in giving instruction on flight as evidence of guilt was harmless; (2) photographs of recovered stolen items were admissible; (3) testimony of accomplice as to defendant's participation in prior crimes was admissible; (4) police officer could testify regarding statements of third parties which caused him to take certain action; (5) theft of items from victim's home and of automobile from victim's garage constituted only single theft offense; and (6) consecutive sentences were warranted.

Affirmed in part, vacated in part, and remanded.

Pivarnik, J., concurred in part and dissented in part.

1. Criminal Law ⇐913(3), 1172.6

Trial court should not have given jury instruction on flight as evidence of guilt, in light of uncontradicted evidence showing that defendant surrendered to police and did not attempt to flee; error was harmless, however, in light of direct testimony of accomplice and ample physical evidence linking defendant to crime.

2. Searches and Seizures ⇐7(26)

Whether nonowner may challenge constitutional validity of search depends on whether he has legitimate expectation of privacy in place searched, which is fact question to be determined on case-by-case basis. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(26)

Frequent guest at premises he does not own has no legitimate expectation of privacy in premises, so as to give him standing to challenge constitutionality of search, unless he produces other evidence to show that he maintains degree of control over premises. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐7(26)

Evidence that defendant stayed at residence of his girlfriend "once in a while" was insufficient to establish his legitimate expectation of privacy in residence sufficient to give him standing to challenge constitutionality of its search; defendant made no showing that he had any degree of control over residence or any part therein. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐111

Victim's identification of photographs as pictures of items similar to those taken from his home was sufficient to establish relevancy and materiality of photographs in burglary prosecution, fact that victim

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 317 1930

No. 1084S423

Thomas N. ~~XXXX~~ Schiro V. State of Indiana

You are hereby notified that the Supreme Court has on this day Appellants petition for Rehearing is hereby DENIED, without Opinion. Givan, C.J.
Givan, C.J., Prentice and Pivarnik, JJ., vote to deny. DeBruler, J., votes to grant. Hunter, J., not participating.

SEP 5 1985

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 4 day of Sept, 19 85

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

APPENDIX C - STATUTORY PROVISIONS INVOLVED

35-50-2-9. Death sentences. -- (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in the subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty [20] or more years remaining to be served before his earliest possible release date as defined by IC 35-38.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review.

[IC 35-50-2-9, as added by Acts 1977, P.L. 340, §122; P.L. 336-1983, §1.]

(3)

No. 85-5972

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS N. SCHIRO,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by that Court in Cause No. 1084 S 423.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Indiana, Cause No. 1084 S 423, is reported at 479 N.E.2d 556 (Ind. 1985) and is included by Petitioner in his brief as Appendix A.

STATEMENT OF THE CASE

Petitioner was charged and convicted of Murder While Committing or Attempting to Commit Rape. The State of Indiana charged the statutory aggravating circumstance that the killing while committing or attempting to commit that specified felony was knowing and intentional. Indiana Code § 35-50-2-9. Pursuant to that same statute, the question of the imposition of the death penalty was put to the jury for their unanimous advisory verdict. The jury recommended that the death penalty not be imposed. However, the trial court, as the sole final sentencing authority under that statute, declined to follow the recommendation of the jury, and entered his findings and judgment imposing the death penalty. The trial court judge stated that he had observed the Defendant continually make a rocking motion of his body at time when the jury was present but not when the jury was absent, and that there were psychiatric opinions of record stating that in the past Schiro had affected rocking motions in order to avoid the consequences of his actions by thereby creating the impression of mental disturbance. A direct appeal ensued, in which the Indiana Supreme Court reviewed the conviction and the death sentence and affirmed both. Schiro v. State Ind., 451 N.E.2d 1047 (1983). Among the issues raised in that direct appeal were issues related to the override of the jury verdict, including the issue whether there were proper standards under which the Indiana Courts could exercise their discretion to reject a jury's recommendation of mercy.

Following the adverse decision of the Supreme Court of Indiana in his direct appeal, Petitioner brought the matter directly to this court by means of a Petition for Writ of Certiorari, which Petition this Court denied. Schiro v. Indiana, cert. den. ___ U.S. ___, 103 S.Ct. 510, 78 L.Ed.2d 699. That Petition did not raise the issue of the propriety of the standards under which a trial court may disregard a jury's life recommendation.

The current cause was initiated by Petitioner by his filing in the Court of his conviction of a "Petition for Post-Conviction Relief", pursuant to Indiana Rules of Post-Conviction Relief, Rule P.C. 1.[1] The issues raised in that Petition were (1) whether the trial court judge could properly have judicially observed the times and nature of such demeanor on the part of the Defendant and use it in reaching his sentence, and (2) whether there was evidence that showed a bias on the part of the trial court judge. The petition for post-conviction relief was denied and Defendant undertook the appeal in the Indiana Supreme Court from that denial. That appeal raised two issues:

[1]It was not heard by the same judge, however. Petitioner obtained a change of judge under the provisions of that rule.

(1) whether the trial court was biased and/or had improperly considered his observations of the Defendant's actions and demeanor in court both in the presence of the jury and out of its presence; and (2) whether it was ineffective representation of counsel that certain potential verdict forms were not submitted.[2] The Indiana Supreme Court affirmed that denial (thus declining to grant relief). It is the opinion doing so that is under review in the instant Petition for Writ of Certiorari.

The underlying facts of the crime are as follows: On February 5, 1981, Laura Luebbehusen, a woman 28 years old, was found dead in her home. Blood covered the walls and floor, and belongings were thrown and scattered about the house. A broken liquor bottle and broken iron were discovered among the items.

Two days later, Luebbenhusen's car was discovered a block away from the "Second Chance Halfway House" in Evansville, Indiana. Thomas Schiro, Petitioner, one of the residents there, unexpectedly sought out the house's director and admitted the crime to him.[3] After Schiro was arrested, he told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had had intercourse with Luebbehusen both before and after the killing.

Schiro's girlfriend recounted that on February 7, 1981, he told her he had killed a woman. He told the girlfriend, Ms. Lee, that he had pretended his car had broken down, got into the house to use a telephone, and asked to use the bathroom. He came out of the bathroom exposed. To trick the woman, he falsely told her that he was gay and had a bet with a friend that he could not have intercourse. Luebbehusen was actually gay, and

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[2]As to this issue, which does not appear in the instant Petition, the Indiana Court determined that as the jury were instructed as to all the potential verdicts any such error would have not been prejudicial.

[3]The voluntariness of that admission is not in issue.

with a dislike of men. Under this purported commonality of interest, the two had a conversation, and proceeded to experimentation with sexual devices. Schiro found that painful, and had intercourse with the woman. She attempted to leave, but he stopped her and raped her a second time. He left the house, but returned and raped her again. He fell asleep, and woke up to find her attempting to leave. He made her stay, and she fell asleep. He hit her on the head with a vodka bottle, then with an iron, and strangled her to death. Then he undressed her, assaulted the body sexually, and chewed on several parts of the body. This account of the woman's death was consistent with the findings of the pathologist who examined Laura Luebbehusen's body.

As insanity was raised as a defense, much information was adduced concerning Defendant's background and character. Schiro was described as a sexual sadist, with a poor prognosis of recovery. He was attracted to aggressive pornography, otherwise known as rape pornography, in which women appear to enjoy a violent assault despite the evident pain. He was addicted to masturbation, progressively more and more bizarre forms. He recounted several stories of exposure of himself, culminating in ejaculation either on a victim's window or (if he had secretly gained access to her room) on her face while she still slept. He provided the psychiatrist with a 30-page written document detailing this crime. He recounted twenty-three instances of various sexual assaults. He said that he preferred that his victim not move, because of his desire to practice necrophilia. He wanted to work for a funeral home to have sex with the bodies of dead women.

Linda Summerfield, a victim of one of these assaults, said that he had pretended to need to get warm in her house about six weeks before the Luebbehusen murder, and raped her three times, threatening to kill her children if she resisted. He also liked to hold his girlfriend's baby with his hand over

its face until it stopped breathing, or hold that baby under water in the bathtub, and then resuscitate it.

Four psychiatrists testified that Schiro was legally sane, that is, able to tell the difference between right and wrong and conform his conduct to the requirements of the law at the time of the crime. One of the psychiatrist's witnesses observed of record that Schiro exhibited what the observer characterized as a parody of the behavior of a mentally ill person, evidently intended to convince others that he was insane.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In his recitation of the question presented, Petitioner raises the following issue: "Whether, after Spaziano v. Florida, a State may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty without offending the constitutional requirement of reliability in capital sentencing procedures." (Brief, page 4).

The State of Indiana responds to the Petition with the following two issues:

(I) Whether the ground asserted by Petitioner is properly before the Court in this action.

(II) Whether there are constitutionally sufficient standards in Indiana governing the override of jury recommendation against the death penalty and in appellate review of such a judgment.

SUMMARY OF THE ARGUMENT

I. Since the issue of the standards to be used by a trial court in overriding a jury recommendation against the death penalty was not presented by Petitioner in his post-conviction petition or discussed by the State Court in the action below, jurisdiction to hear that issue is not raised by this Petition.

II. Indiana's procedure properly limits the trial court in its exercise of sentencing discretion, including overriding a

jury recommendation so as to prevent arbitrary and capricious imposition of the death penalty, and affords meaningful appellate review of such imposition.

REASONS FOR DENIAL OF THE WRIT

I.

THE GROUND CLAIMED BY PETITIONER IS NOT PROPERLY BEFORE THIS COURT

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 which, in pertinent part, reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

It appears central to the use of the writ that it serves as a means to review a final judgment or decree. Petitioner here seeks to invoke the writ to "review" an issue which was not presented to nor discussed by the Supreme Court of Indiana in the underlying appeal from denial of Post-Conviction relief. (This issue, what standards are to be applied by a trial court in overriding a jury's recommendation of mercy in a capital case, was only presented to the Indiana Supreme Court in the separate direct appeal, and not brought to this Court in the Petition for Writ of Certiorari therefrom. Schiro v. State, Ind., 451 N.E.2d 1047 (1983), cert. den., ___ U.S. ___, 104 S.Ct. 510, 78 L.Ed.2d 699.)

This Court has held that in an action under 28 U.S.C. § 1257(3), a petitioner must have "specially set up or claimed under the Constitution . . . of . . . the United States" that

right which he seeks to have this Court enforce. This Court's Rule 21.1(h) requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). The instant petition only asserts baldly that the rights were asserted below in an action resulting in denial of petition for post-conviction relief, a judgment in a civil action. (Petition, pp. 1-2). However, his own recitation of the stages of this action in the State courts, as well as the decision of the state court under review here, both clearly establish that the Indiana courts were not presented in this action the issue of the standards under which a trial court may override a jury recommendation against the death penalty. (Petition, p. 3; Schiro v. State Ind., 479 N.E.2d 556 (1985).)

The jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. Webb, supra; New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 at 67, 49 S.Ct. 61 at 63, 73 L.Ed. 184 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648 at 655, 17 S.Ct. 709 at 711, 41 L.Ed. 1149 (1897).

The Indiana Supreme Court was presented with and dealt with the issue whether the trial court could properly have considered Defendant's conduct both in the presence of and outside the presence of the jury. It was not presented with and naturally did not discuss the issue of the standards to be applied when a trial court overrides a jury recommendation.

Since the instant federal claim was not presented to the Indiana courts in the post-conviction relief proceeding under review here, jurisdiction does not arise to consider this issue.

II.

INDIANA'S SENTENCING PROCEDURE AND APPELLATE REVIEW WAS NOT WITHOUT ADEQUATE STANDARDS

The substantial issue which Petitioner attempted to raise concerns the standards to be employed in a trial court's override of the jury's recommended verdict, and the Indiana Supreme Court's standards in reviewing imposition of the death penalty.

At the outset, it should be noted that the irsue as framed by Petitioner begs the question: "whether, . . . a state may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty." (Brief, p. 4). Indiana does not have a procedure purporting to give its sentencing authority "unguided discretion". Indiana's capital sentencing procedure, Indiana Code § 35-50-2-9 follows, whether the judge accepts or rejects the jury's recommendation, the Court's stricture that the sentencing discretion must be "limited and reviewable". Gregg v. Georgia 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340.

In Spaziano, this Court first examined the procedure adapted by a small minority of states, including Indiana and Florida, allowing a trial court to override a jury's sentencing recommendation against the death penalty. It found that in such cases, where the judge remained the final sentencing authority, there was no Double Jeopardy violation. It found that the death penalty may be imposed either by juries alone, or by judges alone, or by the hybrid Florida-Indiana procedure which may be called "jury input, judge decision"; the Court declined to hold that there was "any one right way for a State to set up its capital-sentencing scheme". Spaziano, 104 S.Ct. at 3154. "If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the

advice of the jury. The advice does not become a judgment simply because it comes from the jury." Spaziano, supra, 104 S.Ct. at 3154.

Petitioner wishes to impose on trial court judges a "standard of review" of jury advice which is stricter than the standard of judgment demanded of judges who sentence without jury input. This contention is advanced on the theory that Spaziano decision allowing Florida jury override procedure did so because the Florida Supreme Court required adherence to a standard enunciated in Tedder v. State, Fla., 322 So.2d 908 (1975). But Spaziano acceptance of Florida's "jury-override" procedure did not at all rest on the existence of the "Tedder standard". Sections III and IV of the Spaziano opinion, 104 S.Ct. at 3161-3165 concluded that such schemes were permissible; Florida's courts' sentencing discretion was "limited and review able" and contained adequately--defined standards to rationally distinguish cases appropriate for capital punishment from other cases (including consideration by the sentence of the individual circumstances of the defendant, his background, and his crime); all without discussion of the "Tedder standard". Thus, it is clear that the validity of an advisory jury (override) system does not depend on use of the "Tedder standard". Discussion of Tedder arose only because the Petitioner in Spaziano challenged the application of that standard. Spaziano, supra, 104 S.Ct. at 3165. The Court did no more than note that Tedder afforded a "significant safeguard" and was taken seriously by the Florida courts. Then the Court added, "Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." 104 S.Ct. at 3166. The Court then considered Florida's scheme as follows:

> "We see nothing that suggests that the application of the jury-override procedure has resulted in arbicrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla. Stat. § 921.141(3) (Supp. 1984). The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously. § 921.14](4). As Justice STEVENS noted in Barclay,[4] there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overriden [sic] the jury's recommendation and sentenced the defendant to death. See Barclay v. Florida, ___ U.S., at ___, and n. 23, 103 S.Ct., at 3436, and n. 23 (opinion concurring in the judgment)."

Spaziano, supra, 104 S.Ct. at 3166. Indiana's trial-level and Supreme courts must adhere to the very same requirements. Indiana Code 35-50-2-9. All differences between Indiana's and Florida's sentencing scheme actually are to the benefit of the defendant: Indiana's list of aggravating circumstances is markedly more objective and fact-based than Florida's. Fla. Stat. Ann. § 921-141(5); Indiana Code § 35-50-2-9(b). And Indiana requires a threshold finding of existence of an aggravating circumstance to be established "beyond a reasonable doubt" before a death sentence may be considered, while Florida does not impose that strict standard of proof in its sentencing procedure.

Indiana's court-sentencing procedure therefore limits the trial judge by its adherence to a strict standard of proof of the existence of at least one specific, charged, statutorily-defined aggravating circumstance; requires every applicable mitigating circumstance to be weighed against it; and requires a

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[4] Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

specific factually based, reviewable written explanation of all factors considered by the court in its judgment. Such safeguards have consistently been held by this Court to ensure that the penalty is not imposed arbitrarily or capriciously. E.g., Proffitt v. Florida, 428 U.S. 242, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Petitioner goes on to attack the Indiana Supreme Court's standard of review. In particular, he contends that the Indiana Court's Rules for Appellate Review of Sentence, Rule 2 precludes "meaningful review" of the death penalty because under those rules the appellate court is to interfere only with sentences that are "manifestly unreasonable". He cites three cases for that proposition: "Judy v. State, Ind., 416 N.E.2d 95 (1981) at 107; Brewer v. State, Ind., 417 N.E.2d 889 (1981) at 899; and Williams v. State, Ind., 430 N.E.2d 759 (1982) at 765."

In fact, Petitioner's contention ignores an exhaustive discussion in his own direct appeal case of the actual standard of review used. Schiro v. State, Ind., 451 N.E.2d 1047 (1983). That discussion did quote the Appellate Review Rules, but in context these rules clearly do not limit the Indiana Court's review. To illustrate that context, and clearly demonstrate that Indiana's appellate review of the imposition of capital punishment is meaningful, it should suffice to quote the Schiro discussion in full:

> "We interpreted the United States Supreme Court's holding in Gregg v. Georgia, supra, a companion case to Proffitt, to be that the death penalty may be applied ". . . if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously." Brewer, supra, 417 N.E.2d at 897.
>
> It is clear that the imposition of the death sentence under Ind. Code § 35-50-2-9 is based upon the nature and circumstances of the crime and the character of the offender being sentenced. Judy, supra, 416 N.E.2d at 105. Also, this Court has

adopted a rule wherein it has exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment, or a minimum sentence of greater than ten years. Ind.R.App.P. 4(A)(7). Therefore, because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment, we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana.

In addition, rules adopted by this Court govern the appellate review of sentences:

> "Rule I
> AVAILABILITY--COURT
>
> (1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.
>
> (2) Appellate review of sentences under this rule may not be initiated by the State.
>
> (3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.
>
> Rule 2
> SCOPE OF REVIEW
>
> (1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
>
> (2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Ind.R.App.Rev.Sen. 1 and 2.

In all cases involving the finding of aggravating circumstances, the sentencing judge must include a statement of the reasons for selecting the sentence he imposes. This enactment, Ind.Code § 35-4.1-4-3 (§ 35-50-1A-3)(Burns Repl. 1979), reads as follows:

> "SENTENCING HEARING IN FELONY CASES.--Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and

call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) A transcript of the hearing;

(2) A copy of the presentence report; and

(3) If the court finds aggravating circumstances or mitigating circumstances a statement of the court's reasons for selecting the sentence that it imposes."

The above statute insures that in all instances where the death penalty is applied, the trial court judge must submit written findings indicating the aggravating factors he found to be present in imposing a sentence of death. This will guard against the influence of improper factors at the trial level and will make sure that the evils of Furman v. Georgia, (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, "arbitrary and capricious application" of the death penalty, were not present in the sentencing decision.

Not only do the trial court judge's written findings facilitate meaningful appellate review, this review is guaranteed to be thorough and adequate since we have before us the entire record of the proceedings, not just the sentencing hearing. Brewer, supra; Judy, supra. Thus, examination of the record, plus the sentencing hearing and the trial court's findings, protects each individual's constitutional rights.

Therefore, because of procedure mandated by statute, codified by rules, and controlled by cited precedent,

". . . this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures 'consistency, fairness, and rationality in the evenhanded operation' of the death penalty statute. Proffitt v. Florida, supra, 428 U.S. at 259-60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927. See Gregg v. Georgia, (1976) 428 U.S. 153, 194-95, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886-87. Cf. Woodson v. North Carolina, [428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944], supra; French v. State, [266 Ind. 276, 362 N.E.2d 834], supra. The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case. Therefore, we find our death sentencing procedures to be consistent and in full compliance with those required by the United States Supreme Court in Gregg v. Georgia and Proffitt v. Florida, and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution."

Judy, supra, 416 N.E.2d at 108.

We find no constitutional infirmities in the death penalty statute nor in the review that automatically follows the imposition of such sentence.

Schiro, 451 N.E.2d at 1052-1053."

Since the sentencing decision in Indiana is properly limited so as to ensure against arbitrary or capricious results, and meaningful appellate review is afforded, no basis is shown for granting of the writ.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issues alleged by Petitioner have been correctly disposed of in conformity with the opinions of this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

THOMAS N. SCHIRO *v.* INDIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 85-5972. Decided February 24, 1986

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

The trial judge in this case rejected a unanimous jury decision that petitioner's life should be spared, and sentenced him to die. Petitioner's allegations, which call into question the reliability of the judge's sentencing determination, further illustrate why a judge should not have the awesome power to reject a jury recommendation of life. Moreover, a serious inadequacy in the Indiana capital-sentencing procedure dramatically distinguishes it from the jury-override procedure that this Court upheld in *Spaziano* v. *Florida*, 468 U. S. —— (1984). I must dissent from the Court's decision not to consider petitioner's substantial claims.

I

Thomas N. Schiro was convicted of murder in the course of a rape and, following a hearing on the appropriateness of sentencing petitioner to die, the jury recommended a life sentence. The trial judge, however, rejected the jury's decision and imposed a sentence of death. Upon direct appeal, the Supreme Court of Indiana found that the trial court's findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro* v. *State*, 451 N. E. 2d 1047, 1056 (1983) (*Schiro I*), cert. denied, —— U. S. —— (19—). That court ordered that the trial court make written findings setting out the aggravating circumstance proved beyond a reasonable doubt

and the mitigating circumstances, if any, as listed in the state statute. *Ibid.*

In response, the trial court specified one aggravating circumstance, that the jury had convicted petitioner of murder in the course of a rape; it then stated that it found no mitigating circumstances, listing and rejecting each of the statutory mitigating circumstances, even though several were suggested by the evidence. With regard to the mitigating factor concerning a defendant's mental or emotional condition and the impairment of his capacity to appreciate the criminality of his acts, the court found as follows:

> "This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

On the basis of his own suspicions, not subject to evidentiary requirements or tested by cross-examination, the judge decided that a unanimous jury was wrong and that petitioner should die. The Indiana Supreme Court upheld the sentence of death. *Schiro* v. *State*, 470 N. E. 2d 556 (1985).

In *Spaziano* v. *Florida*, *supra*, this Court sustained a scheme that gave the judge the power to override the jury's decision to impose a life sentence, provided that the judge could make certain specified findings. The Court relied, in part, on the Florida Supreme Court's anticipated adherence to the so-called "*Tedder* standard." Under *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975), a Florida trial judge may not reject a jury decision of life imprisonment unless the evidence favoring death is "so clear and convincing that virtually no reasonable person could differ." *Ibid.* This Court believed *Tedder* to be a "significant safeguard," *Spaziano*, 468 U. S., at —— , and was satisfied "that the Florida Supreme Court takes that standard seriously." *Ibid.*

In contrast, the State of Indiana has not committed itself to any comparable safeguard to protect against the arbitrary rejection of a life sentence. On the contrary, the rules governing the scope of appellate review of sentences provide that the appellate court "will not revise a sentence authorized by statute except where such sentence is *manifestly unreasonable*," and a "sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate . . . ." Ind. Rules App. Rev. Sen. 1, 2 (emphasis added). Applying these rules to death sentences, the Supreme Court of Indiana specifically declared that it "will not engage in a different standard of review where jury and trial court disagree" concerning the appropriateness of the death sentence. *Schiro I*, *supra*, at 1058. Thus, while the *Tedder* standard accords the jury's recommendation a presumption of correctness by requiring "clear and convincing" evidence to justify overriding it, the Indiana Supreme Court accords a similar presumption to the judge's sentence, whether it was imposed pursuant to the recommendation of the jury or against it.

This Court has emphasized that a sentence of death must reflect an ethical judgment about the "moral guilt" of the defendant. See *Enmund* v. *Florida*, 458 U. S. 782, 800–801 (1982). "Moral guilt" is a determination that a jury, as representative of the community, is peculiarly well-suited to render. But if a prosecutor, even with the substantial tools available to him, see, *e. g.*, *Wainwright* v. *Witt*, —— U. S. —— (1985); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), is unable to persuade the conscience of the community that death is the appropriate punishment for a particular offense, then that expression on the question of "moral guilt" is entitled to at least some weight. By according no significance at all to the jury's assessment of the crime and the defendant, either at the sentencing itself or on appeal, Indiana's procedure derogates the historic role of the jury. "*Furman* [v.

Georgia, 408 U. S. 238 (1972)] and its progeny provide no warrant for—indeed do not tolerate—the exclusion from the capital sentencing process of the jury and the critical contribution only it can make toward linking the administration of capital punishment to community values." *Spaziano*, *supra*, at —— (STEVENS, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

Moreover, the disregard of jury determinations injects a "level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck* v. *Alabama*, 447 U. S. 625, 643 (1980). In this case, for example, the judge speculated that the jury's recommendation of life "may well have" resulted from petitioner's propensity to rock back and forth in the presence of the jury. Indiana law does not require the jury to set forth its reasons for recommending a life sentence, so the court could not have known whether the rocking motion had anything to do with the jury's verdict; the court's decision was necessarily speculative. The reliability that this Court has demanded from capital sentencing decisions is totally lacking here, and the "manifestly unreasonable" standard adopted by the Supreme Court of Indiana effectively insulates the sentence from meaningful review.

Because I understand the Eighth Amendment to require, at the very least, that a jury's considered recommendation of a life sentence rather than death not be ignored without some showing that it was unreasonable, I would grant the petition to review Indiana's method of bringing to execution those whose juries believed that they should live.